

IN THE
SUPREME COURT OF MISSISSIPPI
RUST LAND & LUMBER COMPANY

v.

ED JACKSON ET AL.

BRIEF FOR APPELLEES IN REPLY.

The brief in chief having been dictated before the filing of appellant's brief, we feel in duty bound to reply to certain points therein.

Appellant, as a fundamental proposition, contends "The undisputed evidence shows that the true title to the land, where the timber was cut, was in defendant." We join issue squarely upon this point, and take the last point made as the first to reply to, for if the court accepts our conclusion, the question of the burden of proof is immaterial.

Counsel says: "Assuming then this land is within the State of Arkansas (which we concede only for the sake of argument), we insist that under the facts of this case* * * the title is in defendant. This contention is based upon the fact that the record shows that after the cut-off was made, the water gradually receded from defendant's land and uncovered this land upon which this timber grew. This is reliction." We concede that the law of Arkansas is applicable if the property is within that state. Counsel cites as controlling upon reliction **Warren v. Chambers**, 25 Ark., 120, which case is applicable, not to an avulsion, but to a reliction and accretion. Wherein consider its declaration there made: (Quotation therefrom).

But that case has no bearing whatever upon an avul-

sion, and counsel correctly states our contention that under the avulsion of 1848, the doctrine of accretion and reliction has no application. Counsel concedes that **State v. Pulp Co.**, 119 Tenn. 47, and **Stockley v. Cissna**, 119 Tenn. 135, directly support our contentions, but the contention is made that these decisions are directly contrary to **Warren v. Chambers**. We shall show that **Warren v. Chambers** is confined to accretion and reliction and does not deal with avulsion.

Counsel cites **Harrison v. Fite**, 148 Fed. 781, which is a decision by a Federal court and is valueless because it merely announces the Federal court decisions as to the state law following implicitly the ruling the Supreme Court.

Archer v. Greenville, 233 U. S. 68.

There is a fundamental difference between the doctrine of reliction and accretion and the doctrine applicable to avulsion. These fundamental distinctions are established in the State of Arkansas. Counsel here relies upon **Naylor v. Cox**, 21 S. W. (Mo.) 589, which he quotes, but which held merely this so far as applicable: (Quotation therefrom).

Turn to **State v. Keene**, 84 Mo. App. 130, which was an avulsion case and note the decision. (Quotation therefrom).

It will be noted that this (**Naylor v. Cox**) was not an avulsion but a reliction and accretion and the doctrine of the two are absolutely dissimilar.

Counsel then cites as conclusive the decision of **Nix v. Pfeifer**, 83 S. W. 951. Counsel's quotation therefrom is as follows: (Quotation therefrom).

It will be perceived that therein there is an omission

from the decision as made, which omission is indicated by stars. But those stars represent the gist of our contention, and that decision is controlling in our favor with the insertion of the full quotation. (Quotation therefrom).

So, it will thus be seen that that decision expressly excepted avulsions from its declaration and leaves the law of Arkansas upon that point in accordance with our contention as set out in our main brief. Note furthermore, in the syllabus of said decision it is said: (Quotation therefrom).

And this saying accurately delineates the holding of the Court.

Turn to **Cessil v. State**, 40 Ark. 504, where the Court said: (Quotation therefrom).

This case is approved in **Deloney v. Arkansas**, 88 Ark., 313, and **Wolf v. State**, 104 Ark. 43.

It will be perceived therefore that the Supreme Court of Tennessee, which quoted the foregoing from the Supreme Court of Arkansas, was following the Arkansas decision, and not, as counsel contend, overturning it.

Counsel, we feel sure, was inadvertent in the omission, but such omission changes that decision from one in his favor to one in our favor.

Again reliance is placed upon **Barboro v. Boyle**, 178 S. W., 378, with which we have no complaint to make. It is entirely in accord with our contention; its syllabus declares: (Quotation therefrom).

And in the body of its opinion, our contention is accurately set forth thus: (Quotation therefrom).

Later, in **Johnson v. Quarles**, 182 S. W. (Ark.) 288, it was held that the bottom of the Mississippi river belongs to the State. See, also, **Southern Sand etc. Co. v. State**, 180 S. W. 219.

Counsel seems to think that the change in the bed of the Mississippi river would unduly enlarge the public rights. This very argument is met and answered in the cases from Tennessee, and counsel's statement that the State would own three abandoned beds (see page 34) is answered by the fact that under the settled law avulsion does not divest title, and instead of owning three beds, the title to the underlying soil would be vested in the State as to one channel alone. The right of public passage would belong, of course, but the ownership of the soil would not cease.

The fundamental trouble with counsel's argument is, that he fails to grasp the reason of the law. Where there is a stream, and that stream gradually, either by accretion or reliction, changes its boundary, the said boundary remains the same, because he who stands a chance to gain by accretion, also stands a chance to lose by the same agency, but where the agency that brings about the change has ceased to exist, then the reason of the law has ceased to exist, and the reason having ceased, the law ceases as well. See **Nebraska v. Iowa**, 143 U. S. 361, 36 L. Ed. 188, wherein the reason of the rule is thus accurately stated in the opinion of the Attorney General of the United States, there quoted. (Quotation therefrom).

See **Gould on Waters**, Sec. 159, 1 **Angell, Water Courses**, Sec. 60; **Missouri v. Nebraska**, 196 U. S. 33, where in the words of Mr. Webster, the reason of the doctrine is thus stated from **New Orleans v. United States**, 10 Pet. (U. S.) 662. (Quotation therefrom).

And again, in the words of that tribunal: (Quotation therefrom).

Our examination of this question has been very thorough, as much so as it was possible to make it, and we have not found a single decision in America that attempts to apply the doctrine of accretion in a case of avulsion in the case at bar. The reason ceasing, the law itself ceases. There is no justice in taking one man's land and giving it to another for the purpose of preserving a boundary which has ceased to exist. Our court in **Nix v. Dickerson**, 81 Miss., 632, refused to follow that line of cases which took away the property of one party and gave it to another, and held: (Quotation therefrom).

Accretion preserves the boundaries at the expense of the abutting owner upon the hypothesis that by allowing the river to remain the boundary, each party is benefited, but where the river ceases to be the boundary, then there is no reason for the application of the rule. The theory of accretion demands that there should be an agency which can both give and take away, and that in order to conserve the public convenience, the boundary must remain the same, as the parties have an equal chance to have their property remain or to have their property taken away. This potential giving and taking away is that, upon which is predicated the doctrine of accretion when there is added thereto the convenience of having a public stream as a boundary. But take away the public stream; have its bed abandoned, and that which at one time caused the operation of this rule of law ceases to have any applicability as demonstrated by the decisions in the Supreme Court of Tennessee, to which we have heretofore made reference. Counsel has, therefore, upon this head, cited cases from only two states. From each of these states, we have shown that the rule is contrary to the contention made by counsel,

and we submit, with the utmost confidence, the unanswerable argument made by the Supreme Court of Tennessee.

There was no denial of the doctrine of accretion by the Supreme Court of Tennessee in the Pulp Company and Cissna cases. That doctrine was recognized in its fullest extent, but the doctrine relative to avulsion was shown there to contain the controlling principle. See **State v. Keane**, 84 Mo. App. 130; **Marks v. Sambrano**, 170 N. W. 549; **In Re City of Buffalo**, 99 N. E. 852; **Railroad v. Coulthard**, 96 Neb. 610; **State v. Brown**, 135 N. W. 494; **Rover v. Michelson**, 82 Neb. 49.

Therefore, with the utmost confidence, we submit that appellant has no title to the land that was originally covered by the Mississippi river, but that the title thereto is in the State of Arkansas, and counsel in his able brief has made no reference to the fact that they were only paying taxes upon 70 acres of land, upon a basis of \$275.00, and that said 70 acres were almost a mile from the land upon which the timber is cut.

2. Counsel's next assignment to which we direct attention is: "The court should have directed a verdict in favor of defendant. The undisputed evidence shows that neither plaintiffs, nor their vendors, had either actual occupancy, adverse possession, or title to the land where the timber was cut." In answer, we deny (1) that the land was in the State of Arkansas, but aver that it was within the State of Mississippi. Counsel predicates this assertion upon this declaration: "This insistence is founded upon the further insistence, that this land is north of Old River which lies between it and the land of plaintiffs' vendors in the State of Mississippi; that Old River was the thread of deep water and the navigable channel of the Mississippi river in 1848, and was at that time, and is now, the boundary between the States of Arkansas and Mississippi." (a) Appellees' witnesses,

before the jury, testified that Old River, which is called Pecan Lake, the term "Old River" having never been heard by some of the plaintiffs' witnesses, was formed by an overflow in 1857, when the levee broke. This testimony is uncontradicted by any witness and was accepted by the jury. And under counsel's opening concession that he accepted all of the findings of the jury as conclusive, we submit this finding cannot be assailed. (b) This record shows that the Mississippi river, in 1848, was substantially of the same width that it is today, approximately three-quarters of a mile wide, or perhaps a little wider. There is in this record no proof from beginning to end as to where the navigable channel of the Mississippi river was located in 1848. That being true, we submit two propositions: (1) The boundary was midway between the fixed bank in Mississippi and the fixed bank in Arkansas; (2) Assuming this not true, and that the navigable channel governs, then that there being no proof, thereof the presumption is that said boundary was equidistant between Arkansas and Mississippi. It appears that the Mississippi bank is a high bluff bank at the present time, and extend a line northward therefrom three-quarters of a mile, and appellant will not have a shadow of title to the land from which this timber was cut. Appellant contends that the boundary between Arkansas and Mississippi is the thread of what is now Pecan Lake, but primarily there is no proof upon which to predicate any such assumption, that this Pecan Lake was the **navigable channel** of the Mississippi river. As to where such boundary is located, the Supreme Court of Arkansas has rendered an express decision which counsel has overlooked. Note **Cessill v. State**, 40 Ark., 501, where the rule of law is thus declared. (Quotation therefrom).

In concluding that opinion, the Court said: (Quotation therefrom).

The main channel, therefore, as determined by the

Supreme Court of Arkansas and the Supreme Court of Mississippi is a point equidistant between the fixed banks. This was the decision in the Tennessee case in virtue of the decision upon the precise point of the Arkansas court. Upon these decisions thus defining boundaries, the Supreme Court of the United States, under the authorities cited in our original brief, is bound to follow the local law, and is not at liberty to bring into the question that which the states have decided for themselves. The main channel of the Mississippi river is not where Pecan Lake is located, but lies equidistant between the Arkansas shore as fixed then and the Mississippi shore as then fixed.

The decisions from the Supreme Court of the United States do not in any way concern us, because Arkansas and Mississippi have fixed between themselves this boundary, and that boundary is as heretofore declared.

We respectfully submit that the record in this case wholly fails to show what was the navigable channel in 1848. There is not a witness who testifies upon that point, and the witnesses who did testify show that this lake was washed out in 1857, when the levee broke. We deny that this body of water is known as "Old River." Generally, of course, the very partisan witnesses who appeared for appellant, did so testify, but their testimony is discredited. We deny that the record shows that the well defined channel leads from either end of it to the Mississippi river, and submit that the evidence for the appellant makes no such showing. We deny that the record shows that the timber gradually becomes smaller as one approaches old river.

Would it be tolerable for the State of Mississippi to have to accept, say where the river is three-quarters of a mile wide, one-half of a body of water which is, say three hundred yards wide, as its portion, when the other state

has held that its jurisdiction extends no further than the middle of the channel? Where would the jurisdiction of the State of Mississippi end, and who would have jurisdiction over that portion of the river which is held by the Supreme Court of Arkansas not to belong to Arkansas, and which lies between that line and the line to which appellant contends the State of Mississippi's boundary extends? That fact would lead to endless litigation which would be highly profitless because a man can always be trusted to claim that which belongs to him rightly, and not claiming under the decision of the Arkansas court beyond the thread of the main channel of the stream, we have a condition in which both states upon the banks of the Mississippi have, by a uniform course of decision, established that the center of the fixed channel was their division line. See the authorities collated in the main brief.

2. There is no proof where the steamboat channel was at the date of the transaction in question. There is absolutely not a line in this record, from one end of it to the other, with reference to that fact, and it therefore is a question which rests upon presumption, and the presumption in that behalf existing is stated in **State v. Keane**, 85 Mo. App. 130, thus: (Quotation therefrom).

See **Dunleith v. County**, 55 Iowa, 558, and cases collected in our principal brief upon this point, collected from the Tennessee case and there referred to.

3. As said in **Iowa v. Illinois**, 147 U. S. 9, quoting from Halleck in his *Treatise on International law*: (Quotation therefrom).

Woolsey in his "International Law" repeats the same doctrine and says: (Quotation therefrom).

It does not appear in the instant case that the bed

of Pecan Lake was the more suited for navigation. On the contrary, this court judicially knows that in rounding a bend in the river, the steamboats do not take the long course around the bend, but follow that channel as close as possible to the farther shore. In other words, they take the shortest cut possible, and taking the shortest cut possible, the navigable channel used by the steamboats would not lie under the cover of the Mississippi bank but would be on the contrary as near the Arkansas shore as it may be possible to go with safety. That channel would be adopted both by the boats ascending and descending the river, because if they followed the farther shore this would entail their going many miles farther than would be the case if they took the short cuts and followed the navigable channels near the opposite bank. These facts are so patent as to make a contention to the contrary without foundation.

4. As further held in the same case in the Supreme Court of the United States, where the states have by custom established the boundary at the middle of the stream equidistant between its banks, that court there says expressly that such custom of such fixation is conclusive. We have shown such fixation by the State of Arkansas, and necessarily by the State of Mississippi, and therefore, we reach the conclusion that a line drawn equidistant from the fixed shore in Arkansas and the fixed shore in Mississippi, would be the dividing line between appellees and the State of Arkansas. The high-water mark on the Arkansas shore is the boundary line of the appellant. The deepest channel is not of necessity the boundary line. The interest of the State is not in the depth of the water but **in the navigation of the stream.** **Navigation and depth** are in no wise synonymous, and in order to afford the most effectual protection to the adjoining states in the enjoyment of the river, the rights with reference to navigation would have to determine the boundary line. It would be intolerable to compel

one state to follow the deep channel when by so following said channel, the boats of the adjoining state could take advantage of a perfectly safe channel which would be shorter and more expeditious. Navigation, and successful navigation is the criterion, and where the navigable channel was is a question which we are not prepared to answer further than to say, it certainly did not in any way coincide with the dividing line of the middle of Pecan Lake. Counsel says "The plaintiffs herein had the right and authority from the owners (that is, the owners of Lots 1 to 9, inclusive) to cut the standing timber on said lots within the calls of said owners' deeds." Counsel contends that this did not cover the right to cut the timber on accretions to the lots. The parties to the contract, conceding, for such must be the case, that the owners of lots 1 to 9 have allowed the cutting to be done under the contract in question, we do not see where the appellant is in any position to raise the question. It was not any concern of the appellant what these parties agreed upon, so long as it did not invade its rights, but the contention that the deed to the lots did not carry title to cut is preposterous. It is shown that the timber was paid for on the basis of \$3.50 per thousand, and that the timber that was cut was the timber that was intended to be cut. Of this, there can be no question. Counsel plants himself upon the proposition that the right to cut on the lots did not carry the right to cut on accretions to the lots, so as to protect the right as against trespassers. That this is absolutely without foundation is demonstrated by all of the authorities. Does a deed to a lot embrace the accretions? In the court below this question was not raised, but even so, appellant cannot take advantage because appellees' ownership extended to the thread of the stream, and the lots embraced this riparian right as part of the land within their calls. The fundamental error which appellant makes is that under the law of Mississippi, riparian rights project the title to the thread of the stream,

and we claim not so much by accretion as under an absolute chain of title as those who own the shore of lots 1 and 2. When the avulsion occurred, title became perfect, and the question of reliction and accretion ceased to operate. Our property which had been subject to the right of public passage while the water ran over it became discharged and the deed to appellant must be construed in accordance with the local law.

Archer v. Greenville, 233 U. S. 68, L. Ed. 853, where the court said: "This court has decided that it is a question of local law whether the title to the beds of navigable rivers of the United States is in the state in which the rivers are situated or in the owners of the land bordering upon such rivers." Citing and collecting numerous cases.

Note the instructions which the appellant received, which were far more liberal than it was entitled to, and note, please, what the jury thought of the testimony which it discredited.

5. Counsel's final proposition is that the court erred in giving this instruction: "The court instructs the jury that should they find from the evidence that the plaintiff cut the timber in controversy in good faith by authority of King and Anderson, Charles McGhee and Ellen Jackson, who *bona fide* claimed the lands as accretions to Section 11, Township 28, R. 5 West, in Coahoma County, Mississippi and the defendant by force or intimidation took the timber away from them, then the plaintiffs have made out a *prima facie* case, and it devolves upon defendant to show by a preponderance of the evidence that it is the owner of the land from which the timber was cut before defendant can recover in this case." If counsel was so certain of the latter proposition, namely, that he was the owner, there would be no necessity of making this question of the burden of the

proof the principal assignment of error, devoting thereto more than half of his argument. Note the instructions for appellant. Counsel says it to be axiomatic that "the burden of proof is on the plaintiff to show his title and right to possession." But this court has expressly held in *Coleman v. Lowe*, 13 So. (Miss.) 227, that "An instruction that the right to possession and to title must both be the plaintiff to enable him to recover is error as the right to possession is sufficient to maintain the action."

We have no fault to find with *Austin v. Terry*, 88 Pac. 189, nor *Bronson v. Carriage Co.*, 93 Miss. 793. Counsel claims that there was no right to bring replevin. Yet he took issue and tried the rights of the parties therein, and now having lost, is he at liberty thus to experiment with the courts? But *Gastrell v. Phillips*, 61 Miss. 413, demonstrates the right of appellees here to sue. There was an actual possession of a large portion of Section 11; in fact all of that portion which lay outside of the levee; whereas that portion inside of the levee was subject to overflow and incapable thereby of actual occupancy. See *McCaughn v. Young*, 85 Miss. 277.

Turn to the record, page 9:

"Q. Who has been in actual possession of that land during all of that time claiming it as theirs?

A. Same parties claiming it now.

Q. That you bought the timber from?

A. Yes sir.

Q. Did you ever know it to be disputed by anybody at all?

Defendant objects.

Q. What, if any, dispute about it, did you ever hear?

A. No, sir. None at all.

Q. Who claimed to own that land to you there at that time, adversely to the world?

A. King & Anderson, Ellen Jackson and Joe Williams."

It appears that appellees had been at work cutting this timber and getting it in shape for three weeks prior to the time of the taking of said timber from them by force, and that they had purchased it, paying therefor \$3.50 per thousand, and that at that time, they were well known to be the parties claiming said title, and thereupon the "high sheriff" of Phillips County, Arkansas, came with a representative of appellant, invaded Mississippi territory and with a warrant, and their actions are thus described:

"A. He come and brought warrants from Phillips County, Ark., and when he come, he told us that if we give the timber up, or else come on with them; of course when he come and brought the high sheriff, rather than go with them, they taken it way from us."

The appellees at once consulted counsel who told them to have the raft made and bring it within the unquestioned jurisdiction of Mississippi, and that by working for appellant who had by violence taken their property they lost none of their rights, is, we submit, too plain for argument. No man can found a right upon his own wrong.

Note again (R. 11):

"Q. In what way did they take it from you, by force or not?

A. By force, we wasn't willing to give it up; came there with the High Sheriff from Phillips County; we were satisfied we were right, but when the High Sheriff come, couldn't help it, said it would be in compelled to

give it up when the High Sheriff come, and he come and took it away from us.”

Again (R. 22) it appears that the owners were in possession of this land, claiming it as theirs, and had repeatedly sold timber therefrom.

The acts of the sheriff are thus designated again (R. 26):

“A. Well they just said they must have it, had to have it.

Q. Well, what did they say, if you didn't let them have it?

A. Said if we didn't let them have it, why, of course, they were going to put us in jail.

Q. Did you turn it over to them willingly?

A. No sir. I didn't turn it over to them willingly.

Q. What did you do immediately when they took charge of the timber?

A. When they took charge of the timber, of course, he explained to me that this was the sheriff of Phillips County, Arkansas, but me being a negro man, I just give down, had to give down.”

Counsel is in error in stating that there was no adverse possession by appellees' vendors. There was not only possession, but possession under color of right, and possession taken under a survey made with the lines marked out, not once, but several times. Appellees' vendors were in possession directly south of the levee, and if they were the owners of the land, their constructive possession was just as valid as the alleged constructive possession of the appellant, which could have, however, in no case, extended below the **highwater mark** on the Arkansas side, because it is fundamental that neither the United States nor the State can be **disseized**. There is no constructive possession as against a sovereign, and

107

108

this is the position as to the Arkansas side of the river. We claim that we have shown beyond the peradventure of a doubt an actual title, but here we enter under those in actual possession of Section 11, who pointed out the timber to be cut, which timber was within the lines run by the surveyor who laid out the land. The prior possession is shown, and irrespective of title, was sufficient to defeat the fictitious claim of the appellant. The doctrine of Shinn on Replevin can have no application in the face of *Gastrell v. Phillips*, 61 Miss., 413, where the land was of this very character, and appellant is not only not shown to hold this land adversely, but on the contrary, the possession thereof is with the appellees. Counsel need go no further than *Gastrell v. Phillips* for the law on this point, and it appears to us to be absolutely conclusive of the point because the court there said that they were disposed to restrict the doctrine "within its narrowest limits and to deny the action as against the actual possessor of the land," and surely there is no pretense that either the appellee or appellant had other than constructive possession. Our court has confined the rule to refuse replevin only where there is "an actual adverse occupation of the land held in good faith under claim of title." We direct attention to the use of "actual occupation" not adverse possession, but actual adverse occupation held in good faith under claim of title, and appellant certainly does not occupy that category because (1) there was no actual occupancy; (2) There was no good faith upon its part, because it paid taxes upon only 70 acres assessed at \$275.00 and (3) there seems to be no claim of title further than to said Sections 22 and 23, which are remotely located. The appellant had not such occupancy as our court has required.

Counsel cites several decisions which do not in any way touch our contention. He cites, first, *Hart v. Vinzant*, 6 Heisk., (53 Tenn. 616) which merely held. (Quotation therefrom).

We endorse unqualifiedly **Lieberman v. Clark**, 114 Tenn. 126, which counsel quotes in part, but omits to quote these very pertinent declarations. (Quotation therefrom).

Cobbey on Replevin is not accessible, but Wells has nothing in it which is in any way in conflict. There had been here an actual possession taken of the land held in good faith, and the defendant's own witnesses admit the taking of the possession. It was a question for the jury to say whether this possession was taken by the defendant from the plaintiffs by force and intimidation. If it was, the instruction presented a rule that is demonstrably correct even under appellant's cases. But in order to condemn this instruction appellant must prove that there is no evidence upon which to base it. The correctness of the instruction where there has been an actual taking of possession, if such is the case, by force and arms, or duress, is admitted even in appellant's own cases. Could there be an action of ejectment for land which was certainly not in possession of appellant? And the reason for the rule ceasing, the rule must cease as well.

The case of **North Shore etc. Co. v. Nicomen**, 101 Pac. 48, merely held. (Quotation therefrom).

The case of **Redford v. Hungerford**, 29 Wis., in no way conflicts with the rules which are announced in the cases upon which we rely.

The rule in Tennessee is given in our favor unequivocally in **Lieberman v. Clark**, 114 Tenn. 126. Surely a possession obtained by trespass cannot be made the basis of an action of replevin, but that does not touch the instant case.

The note in 89 American Decisions cites with ap-

proval the case of **Gastrell v. Phillips**, 61 Miss. 413, which, of course, is conclusive here.

Counsel enunciates here four propositions: (1) "The burden of proof is upon plaintiff in an action of replevin to show his right of possession." Conceded. We have shown prior possession unlawfully and forcibly terminated and actual ownership in our vendors who pointed out the property and continued in actual possession. (2) "In an action of replevin for articles severed from the realty that person is entitled to prevail who has actual adverse possession of the realty, which carries with it the possession of the articles severed." This we answer by denying that appellant had any possession and by averring that appellees were in possession, and further, by stating that he who by force takes from an-

other, cannot question that other's right of possession, except he prove a paramount title in himself. Appellees had just as much constructive possession as appellant, who could not have constructive possession of the **locus in quo** by reason of the ownership by the State of Arkansas. The other two propositions, we submit, are fully answered by the foregoing.

Counsel states "It is not contended by any one that any of these lots extended to the north of Old River where the timber was cut." In this counsel is in serious error. Counsel's own map shows a part of Lot 1 to be north and east of Pecan Lake, and the line as claimed and run by these surveyors included the entire land from which timber was cut. Counsel is in error in stating that there was never any adverse possession of the land by the appellees. It appears that the lines were run, that the timber was sold from time to time, and cut when and as needed, and that the right so to do was claimed by the parties continuously. **McCaughn v. Young**, 85 Miss., 277, demonstrates that this is adverse possession. It will

be perceived that appellants did not go to the timber where it had been felled and take possession of it **there**, but while appellees were sojourning at their homes on the Mississippi side of the levee, unquestionably, came with the sheriff of Phillips county, and according to appellant's own testimony, seized the possession from these parties and made them give up their rights or else accompany said sheriff from their homes in Mississippi, on Mississippi soil, into a foreign state under warrants issued by some official who had the temerity to do the bidding of this corporation. Logs are not capable of actual but only constructive possession while in the woods. The case is not one where the timber was taken or cut by the appellant, but where the appellees who had worked, were brought face to face with the appellant who took from them the timber and made them give up their rights or else go to jail.

It appears that the highwater was rising and that unless this timber was immediately cut it would have been valueless to all persons.

Counsel says "It fully appears from the record that the presence of the sheriff with the agent of defendant was intended as a warning against future trespasses. "And, yet, the witnesses say that it was either deliver possession of this timber or go to jail. Appellant shows that the date of the conversation between the sheriff and the appellees was January 21, (R. 66) and "The conversation between you and the deputy sheriff and these plaintiffs was on what date? (R. 66). A. It was on the 21st of January." Turn to the evidence (R. 2) which shows the affidavit to have been sworn to upon the 22nd day of January; the writ issued **January 22**, but was not executed until February 8th. (R. 3-4). So that when appellant tells the court that these negroes willingly surrendered the timber, he is manifestly and palpably telling what is not so, and yet, according to his own ad-

mission at page 64, we have this: "Q. What threat did you make against them, if any, if they did not release it? A. Well, the deputy sheriff told them if they ever went across there or did not release this timber they were going to take hold of them **and take care of them.**" With this declaration that they were going to be taken care of, is it wonderful that these ignorant negroes "willingly" gave up the timber? At page 65 of the record, this witness is a little more explicit as to what was meant by "taken care of," namely, "They were going to be put in jail" for buying timber at \$3.50 per thousand, expending their labor upon it, and then trying to sell it, and yet for that they were to be put in jail in a foreign state. The witness says: "He was taking charge of the timber" and "The negroes were satisfied." "Q. What did they say? A. **They gave up the timber at that time in my possession.**"..Of course, cumbrous articles cannot be handed from hand to hand, but in the words of this most antagonistic witness who said that the negroes were satisfied, he tells the court that he got **possession** from the negroes, and we say that if his statement that he got this **possession** from the negroes is true, then that possession so thus gotten was taken away from them by force and intimidation and under duress, so that they could rely upon their prior possession as adequate protection for the reasons set forth in the Lieberman case. Let him return the possession and sue in replevin.

Counsel is in error when he claims that the title to the land from which the timber was cut was not and is not claimed by appellees' vendors. That such claim was made is evidenced by the motion to set aside the continuance herein made.

The law contained in the instructions complained of at page 18 is clearly correct where the prior possession of the plaintiffs is shown and such possession is wrongfully terminated. Authorities supra.

Counsel says: "We take it that it will not be insisted by learned adversary counsel that there is any evidence in the record that actual adverse possession of the land was in plaintiff's vendors, because there is absolutely nothing in the record to sustain such an insistence." But we respectfully submit that counsel is in grave error in both statements, because we show by the witnesses that they have for years been in actual possession of the land outside of the levee and had the same in cultivation, and that they have sold timber from the lands here in controversy, and that no one has disputed their right to possession; that they have had their lines run and bought with reference to these lines.

Counsel complain under the sixth assignment of error that it was erroneous to require that appellant prove his ownership, but we submit that where force is applied, that is the only means whereby appellant can succeed. Authorities in original brief.

We deny that there is any evidence in the record that the plum orchard is now or has been for years in cultivation. The other field, said to be partly on accretions, is within the boundary of the State of Arkansas, and does not come within our claims, and is separated by Dustin Pond from the land in question. Whether or not this land was in the possession of a caretaker is a point in issue, and the cutting of the timber that was down is a point in issue upon which the evidence was in conflict, and the jury disbelieved appellant upon the point.

Appellant claims that they treated any one who cut timber as a trespasser, and yet the appellees show continuous cutting, going back many years, whenever they desired to cut it, and no action instituted on account of such cutting.

Where a party takes from the possession of another

property by force, the only defense which such party can assert in answer to an action of replevin is ownership, and this is so held under all of the cases.

Counsel rely upon **Frizelle v. White**, 27 Miss., 198, which does not touch this question, and **Taplin v. Wilson**, 4 Hun. (N. Y.) 248, which is quoted from, contains nothing to which we do not subscribe.

The further quotation from the same case shows:

“This is not a question of estoppel. It is rather the same doctrine by which a party who has voluntarily settled with another a disputed claim shall not be allowed to open that settlement on the ground that he might have done better for himself. ‘Compromises are to be encouraged, because they promote peace, and when there is no fraud, and the parties meet on equal terms and adjust their differences, the Court will not overlook the compromise.’”

Counsel say in this case “The defendant took possession of the timber while it was lying where it was cut. No one was in possession of the timber when defendant took it.” He quotes as sole authority *Deshay*, who is a discredited witness, and *Deshay* testifies expressly that he got possession of it from the negroes under the conversation held in Mississippi under the threats given by the sheriff “of taking care of these negroes.”

Counsel is in error about stating that the negroes worked on this timber thirty days. The conversation as shown occurred January 21st. The affidavit in replevin was made January 22nd, and was levied as soon as it was feasible upon February 8th. But the writ of replevin issued upon January 22, under which the sheriff was commanded upon that date to make his levy, and the

fact that he did not levy until the 8th of February cannot prejudice plaintiffs' rights. We did not want this defendant to run these logs off into Arkansas, and the very day after this outrageous conduct, the appellees brought their suit in the courts, and surely there cannot be a ratification by the failure of the sheriff to levy the writ of replevin when it was placed in his hands, and by him retained from January 22nd until February 8th. The burden of proof does not cut much figure in this case because the rights of the appellees are demonstrable as hereinbefore set forth.

6. In answer to the statement of the case made by appellant, we are going to appeal to the record, because in our conception of the record, there has been an entire misconception of the case upon the part of appellant who seems to have conceived that he was retrying in this Court that which has been decided against him in the court below. This case is one which presents an outrageous wrong, and one which it is the duty of this Court to have remedied.

Appellees showed that Pecan Lake was washed out in 1857 and showed how it was washed out, and there is not in the record anything to contradict this showing. We therefore confidently submit that upon this point, also, the judgment should be affirmed as to continuing the case until the U. S. Court decides the line between Mississippi and Arkansas. We have written this out fully in the brief in the motion to which we refer should it again come in question.

GREEN & GREEN,
Attorneys for Appellees.

We hereby certify that we have delivered a copy of the foregoing answer to appellants brief, to counsel for appellant, before filing.

Jackson, Miss., Oct. 16, 1916.

GREEN & GREEN,
Attorneys for Appellees.